In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-936

UNITED STATES OF AMERICA, et al.,
Respondents,

vs.

EMPIRE GAS CORPORATION, et al.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

SHERIDAN MORGAN
HARRY A. MORRIS
DONALD H. LOUDON
STEVEN G. EMERSON
MORRIS, LARSON, KING, STAMPER & BOLD
Suite 400, Two Crown Center
2420 Pershing Road
Kansas City, Missouri 64108
(816) 421-6767
Attorneys for Petitioners

Of Counsel:
GIBBS, ROPER, LOOTS & WILLIAMS
757 North Broadway
Milwaukee, Wisconsin 63202

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Empire Gas Corporation, et al., Petitioners, respectfully pray that a Writ of Certiorari issue to review the Opinion of the Temporary Emergency Court of Appeals of the United States entered in this proceeding on December 8, 1976, which affirmed an Order of the United States District Court for the Western District of Missouri issued August 9, 1976.

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals of the United States, affirming the Order of the United States District Court for the Western District of Missouri, is as yet unreported and is set forth as Appendix A. The Decision and Order of the United States District Court for the Western District of Missouri is reported at 419 F.Supp. 34 and appears as Appendix B.

JURISDICTION

On December 8, 1976, the Temporary Emergency Court of Appeals of the United States entered its Opinion (A-1). This Petition for Certiorari has been filed less than 30 days from the date aforesaid. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §211(g) of the Economic Stabilization Act, as amended, 12 U.S.C. §1904 note.

QUESTIONS PRESENTED

1. Whether, in a judicial proceeding to enforce administrative subpoenas issued solely to determine compliance with specified regulations, the subpoenaed party can interpose as an appropriate defense that the specified regulations are arbitrary and deny the due process guaranteed by the Fifth Amendment.

2. Whether it is constitutional for the executive to transfer, without prior legislative authorization, all the existing functions of a legislatively-created administrative agency to an executive office when the statutory authority for the administrative agency has expired.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 8, Clause 18 provides that the Congress shall have the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 2, Clause 2 provides that the President:

> * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

The regulations in issue, 10 C.F.R. Parts 210, 211 and 212, control the pricing and allocation of crude oil and refined petroleum products. The regulations have been promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §751, et seq.; the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904 note; and the Cost of Living Council Order No. 47, 39 F.R. 24.

The specific provisions in question establish general price and allocation rules and define the entities to which the regulations apply. The challenged regulations are as follows:

10 C.F.R. §212.10, which establishes Mandatory Petroleum Price Regulations and which sets forth "general rules":

> "(a) No *firm* (including an individual) may charge a price for any covered product which exceeds the maximum price at which that product is per-

mitted to be sold to the class of purchaser concerned under this part." [Emphasis added]

10 C.F.R. §212.93, which sets forth the "price rule" governing "sellers":

"(a) A *seller* may not charge a price for any item subject to this subpart [F] which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with the class of purchasers concerned on May 15, 1973, plus an amount which reflects on a dollar-for-dollar basis increased costs for the item." [Emphasis added]

10 C.F.R. §212.91, which establishes the "applicability" of the subpart regulating "resellers" and "retailers":

"This subpart [Subpart F—Resellers and Retailers] applies to each sale of a covered product (other than the first sale of crude oil) by *resellers, reseller-retailers,* and *retailers,* and to each sale of crude oil (other than the first sale) by a refiner." [Emphasis added]

10 C.F.R. §212.31, which defines the terms "resellers, reseller-retailers, and retailers":

" 'Reseller' means a *firm* (other than refiner or retailer) *or that part of such a firm* which carries on the trade of business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers. [Emphasis added]

'Reseller-retailer' means a *firm* (other than a refiner) *or that part of such a firm* which carries on the functions of both a reseller and retailer. [Emphasis added]

'Retailer' means a *firm* (other than a refiner or reseller) *or that part of such a firm* which carries on

the trade or business of purchasing covered products and reselling them to ultimate consumers without substantially changing their form." [Emphasis added]

10 C.F.R. §211.51 defines the term "firm":

" 'Firm' means any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal government including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments. *The FEO may, in regulations and forms issued in this part, treat as a firm*: (1) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) *any part of a firm.* [Emphasis added]

'Parent' means a firm which is not directly or indirectly controlled by another firm.

'Parent and its consolidated entities,' means a parent and those firms, if any, directly or indirectly controlled by the parent which are consolidated with the parent for purposes of financial statements prepared in accordance with generally accepted accounting principles. An individual shall be deemed to control a firm which is directly or indirectly controlled by him or by his father, mother, spouse, children or grandchildren.

'Unconsolidated entity' means a firm directly or indirectly controlled by a parent but not consolidated with the parent for purposes of financial statements prepared in accordance with generally accepted accounting principles. An unconsolidated entity includes any firm consolidated with the unconsolidated

entity for purposes of financial statements prepared in accordance with generally accepted accounting principles. * * *"

10 C.F.R. §211.10 establishes a method of determining the priority of classes of persons to whom a "supplier" must allocate its product. Section 10(a)(2) defines a "supplier" as follows:

> "For purposes of defining a supplier in this part, a firm shall mean the parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls."

10 C.F.R. §211.51 also defines "supplier", but in the following terms:

> " 'Supplier' means any *firm or any part or subsidiary of any firm* other than the Department of Defense which presently, during the base period, or during any period between the base period and the present, supplies, sells, transfers or otherwise furnishes (as by consignment) any allocated product or crude oil to wholesale purchasers or end-users, including, but not limited to, refiners, natural gas processing plants or fractionating plants, importers, resellers, jobbers, and retailers." [Emphasis added]

Two statutes, the Emergency Petroleum Allocation Act of 1973, as amended (EPAA), 15 U.S.C. 751 et seq., and the Federal Energy Administration Act of 1974, 15 U.S.C. 761, et seq. (FEAA), authorize the FEA to obtain data and information from parties subject to regulations issued pursuant to their mandates. Sections 13(b) and (e) of the FEAA, 15 U.S.C. 772(b) and (e), authorize the Administrator of the FEA to collect information and to issue subpoenas to compel the appearance of witnesses or the production of documents and records:

"§13(b), 15 U.S.C. 772(b)—All persons owing or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption shall make available to the Administrator such information and periodic reports, records, documents, and other data, relating to the purposes of this Act, including full identification of all data and projections as to source, time, and methodology of development, as the Administrator may prescribe by regulation or orders as necessary or appropriate for the proper exercise of functions under this Act.

* * *

§13(e)(1), 15 U.S.C. 772(e)—The Administrator, or any of his duly authorized agents, shall have the power to require by subpoena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section."

Section 13(e)(2) of the FEAA, 15 U.S.C. 772(e)(2), also provides that the agency may seek judicial enforcement of its subpoenas in any appropriate United States district court:

> (2) Any appropriate United States district court may, in case of contumacy or refusal to obey a subpoena issued pursuant to this section, issue an order requiring the party to whom such subpoena is directed to appear before the Administration and to give testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of this court may be punished by such court as a contempt thereof.

Similarly, the EPAA provides authority to issue subpoenas and to obtain judicial enforcement thereof. Section 5(a)(1) of the EPAA incorporates by reference Section 206 of the Economic Stabilization Act of 1970, 12 U.S.C. §1904 note (ESA), which states:

> "The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpoena served upon any person under the provisions of this section, the head of the agency authorizing such subpoenas, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency."

The Federal Energy Administration Act of 1974, 15 U.S.C. 761, et seq. (FEAA) provides in Section 3, 15 U.S.C. §762 that:

> "There is hereby established an independent agency in the executive branch to be known as the Federal Energy Administration. . ."

Section 4 of the FEAA, 15 U.S.C. §763(a) provides for appointment of the Administrator of the FEA, by and with the advice and consent of the Senate:

> "There shall be at the head of the Administration an Administrator (hereinafter in this chapter referred to as the 'Administrator') who shall be appointed by the President, by and with the advice and consent of the Senate."

Section 30 of the FEAA, Pub. L. 93-275, provided for the termination date of the Act as follows:

> "This Act shall terminate June 30, 1976."

Executive Order No. 11930, 41 F.R. 32399, which transferred the functions of the Federal Energy Administration to the Federal Energy Office, is set forth as Appendix D because of its length.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this Petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Empire Gas Corporation (hereinafter Empire) is a retailer marketer of propane which, along with its approximately three hundred retail subsidiaries, is subject to the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210, 211 and 212, promulgated by the Federal Energy Administration (hereinafter FEA).

The FEA began an audit of the Petitioners' books and records in October, 1974, to determine whether there had been compliance by Empire and its subsidiaries with FEA's price and allocation regulations during the period February through October 1974. On or about January 15, 1975, the audit was suspended at the request of Empire.

In order to obtain documents and information for completion of the pending audit, the FEA isued sixty-one subpoenas to Empire and sixty of its subsidiaries in Octo-

ber 1975. The subpoenas directed the Petitioners to appear, testify and produce various books, records, and documents relating to the prices charged by the Petitioners.

Pursuant to 10 C.F.R. §205.8(h)(1), Empire filed with the FEA a motion to quash or suspend the above-mentioned subpoenas, which motion was denied.

The Petitioners did not comply with the subpoenas and on January 29, 1976, the United States of America brought this action on behalf of the FEA in the United States District Court for the Western District of Missouri for enforcement of the subpoenas. The Petition for Enforcement of the subpoenas states that the purpose of the subpoenas is to determine compliance with the FEA regulations contained in 10 C.F.R. Parts 210, 211 and 212. Federal jurisdiction was founded upon Sections 206 and 211 of the Economic Stabilization Act of 1970, as amended, incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, and upon Section 13(e)(2) of the Federal Energy Administration Act of 1974.

The Petitioners base their resistance to enforcement of the subpoenas on the contentions: (1) that the subpoenas were issued solely to determine compliance with FEA regulations, 10 C.F.R. Parts 210, 211 and 212, which regulations are arbitrary, vague, and unconstitutional; and (2) that the transfer of functions from the FEA, its administrator, officers and agents, to the Federal Energy Office (FEO), its administrator, officers and agents, was invalid, unauthorized and unconstitutional, resulting in the expiration of the authorization for the subpoenas and, hence, required termination of this subpoena enforcement action. The Petitioners also contended on appeal that the District Court erred in not modifying the scope of the subpoenas to preclude reexamination by the FEA of records previously

made available to the FEA, but the Petitioners do not seek review of the Temporary Emergency Court of Appeals' disposition of that issue.

On August 9, 1976, the District Court found that the subpoenas were enforceable; ordered that the Petitioners appear and give testimony before the FEA; and ordered that the Petitioners make all documents, records, and material required by the subpoenas available to the FEA at the headquarters of Empire.

On August 13, 1976, the Petitioners filed a motion to vacate the District Court's August 9, 1976, Order, or in the alternative, to substitute parties. This motion was based on the contention that the statute granting the FEA authority to carry out its functions had expired and that the Executive Order No. 11930 dated July 30, 1976, purporting to transfer all FEA functions to the Federal Energy Office, was unconstitutional and that, as a result of the unauthorized transfer, the subpoena enforcement action was moot. On August 13, 1976, the Petitioners also filed a motion requesting the District Court to stay its Order. On September 3, 1976, the District Court denied both the motions filed on August 13, 1976, and ordered the Petitioners to comply with the subpoenas by September 18, 1976.

Notice of Appeal to the Temporary Emergency Court of Appeals had been filed by the Petitioners on August 30, 1976, and on September 7, 1976, the Petitioners filed an Application for Stay of the District Court's Order with the Temporary Emergency Court of Appeals. On September 22, 1976, the Temporary Emergency Court of Appeals stayed the District Court's Order until a ruling on the merits of Empire's appeal could be issued. On December 8, 1976, the Temporary Emergency Court of Appeals affirmed the District Court's Order enforcing the subpoenas.

REASONS FOR GRANTING THE WRIT

1. In Judicial Proceedings to Enforce Administrative Subpoenas Issued Solely to Determine Compliance With Specified Regulations, Lower Courts Are Misconstruing Decisions of This Court to Prevent the Subpoenaed Party From Interposing the Defense That the Specified Regulations Are Arbitrary and Deny the Due Process Guaranteed by the Fifth Amendment.

The growth in the number and scope of investigative activities of administrative agencies over the past four decades has resulted in a dramatic increase in the number of administrative subpoenas issued annually. Although the enforcement of an administrative subpoena is a judicial proceeding in which the subpoenaed party may make " 'appropriate defense' surrounded by every safeguard of judicial restraint" [*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494 (1946)], the tendency among lower courts has been to treat the enforcement of administrative subpoenas as summary proceedings in which the only relevant questions are whether the inquiry is within the agency's authority, the demand is not too indefinite, and the information sought is reasonably relevant to a proper subject of inquiry. E.g., *Securities and Exchange Commission* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir. 1970); *Adams* v. *Federal Trade Commission*, 296 F.2d 861 (8th Cir. 1961), cert. denied 369 U.S. 864, 82 S.Ct. 1029; *United States* v. *Feaster*, 376 F.2d 147 (5th Cir. 1967), cert. denied 389 U.S. 920, 88 S.Ct. 237.

The types of "appropriate defenses" available to subpoenaed persons have been judicially narrowed to exclude the contention that the regulations which are sought to

be enforced by the subpoenas are unconstitutional, with the result that a party whose records have been subpoenaed solely to determine compliance with unconstitutional regulations must bear the burden of producing the records and thereafter being subjected to possible administrative charges for violation of the suspect regulations before being allowed to challenge those regulations.

The Petitioners do not believe that this Court has sanctioned any restriction of appropriate defenses or that the extreme case of arbitrary action such as the admitted harassment in *Shasta Minerals & Chemical Co.* v. *Securities & Exchange Commission*, 328 F.2d 285 (10th Cir. 1964), offers the only example of an appropriate defense in an enforcement proceeding.

The history of the proceedings in this case illustrates the unavailability of judicial relief for a party which has been served with administrative subpoenas that, while otherwise proper, seek records to determine compliance with arbitrary and unconstitutional regulations.

On January 29, 1976, the Respondents filed a Petition for Enforcement of sixty-one administrative subpoenas that had been served upon the Petitioners. The Petition for Enforcement, which was filed in the District Court, states that the FEA is "attempting to obtain information from [Empire] to determine compliance with Federal Energy Administration Regulations 10 C.F.R. Parts 210, 211, 212. . ." These regulations establish the regulatory scheme for the pricing and allocation of crude oil and refined petroleum products, including propane, the product distributed by Empire and its subsidiaries. These regulations set forth affirmative price and allocation rules governing the conduct of "firms," "sellers," "retailers," "reseller-retailers," and so forth, and in the subpoena enforcement proceedings, Empire contended that there was no objective

way of applying these vague rules to a complex business entity such as Empire and its subsidiaries, with the result that application of the regulations was left to the arbitrary power of the FEA. Empire contended that all or any portion of a complex business such as Empire and its subsidiaries could be arbitrarily characterized as a "firm," a "seller," a "reseller," or "reseller-retailer" and so forth at the whim of the FEA; that the FEA could treat Empire and its subsidiaries as one business entity at one time and, under the same regulation, as separate entities at another time; and that Empire and its subsidiaries could be deemed to be one "firm" under one regulation and, at the same time, a congregation of separate "firms" under another regulation. Further, Empire contended that, because there was no objective way of determining how to apply the regulations, Empire and its subsidiaries were unable to conform their price and allocation policies to the mandates of the regulations with any assurance that, in a retrospective audit, the FEA would agree with Empire's interpretation of the regulations.

Empire contended that the inherent vagueness and arbitrariness in the regulations invalidated the regulations on Fifth Amendment due process grounds and hence invalidated the subpoenas, the only purpose of which was to determine compliance with the regulations.

This defense does not claim that Empire and its subsidiaries were immune from regulation; in fact, Empire has consistently admitted that it is subject to the jurisdiction of the FEA. Nor does this defense contest the FEA's subpoena power, or any of the procedural attributes of the subpoenas. The crux of Empire's tendered defense has been the belief that in a judicial proceeding to enforce administrative subpoenas issued solely to determine compliance with specified regulations, it is an "appropriate

defense" that the specified regulations are arbitrary and deny the due process of law guaranteed by the Fifth Amendment of the United States.

The District Court, citing *Oklahoma Press Publishing Co.*, supra, as controlling authority, held that "determination of the . . . validity of agency regulations is not a a condition precedent to enforcement of an agency subpoena." (B-6).

The Temporary Emergency Court of Appeals, presented with the same arguments on appeal, affirmed the District Court, holding that "a court need not determine that the regulatory scheme is valid and constitutional prior to issuing an order enforcing an agency subpoena." (A-8). Again, *Oklahoma Press Publishing Co.*, supra, was discussed as the controlling decision of this Court, along with its predecessors, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 63 S.Ct. 339 (1943) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938). The Temporary Emergency Court of Appeals did not discuss the merits of Empire's contentions that the regulations involved were unconstitutional.

The Petitioners contend that the opinions below, and cases in other district courts and circuit courts of appeal, have consistently misconstrued the teaching of *Oklahoma Press Publishing Co.* and that this misconstruction has resulted in an abdication, in subpoena enforcement proceedings, of the judiciary's historic role as a curb on the arbitrary exercise of administrative power.

Oklahoma Press Publishing Co., supra, the touchstone for all subsequent decisions involving judicial enforcement of administrative subpoenas, involved a proceeding brought by the administrator of the Wage and Hour Division of the Department of Labor to enforce subpoenas duces tecum

issued to the Oklahoma Press Publishing Company to determine whether the newspaper was violating the Fair Labor Standards Act. Five separate but related issues were decided in the case. First, whether the First Amendment prevented wage and hour regulation of newspapers and thus destroyed the statutory basis authorizing the subpoenas. Second, whether that Act contained unconstitutional classifications which invalidated the Act and thus the subpoenas based thereon. Third, whether the Fourth Amendment prohibition against unreasonable searches and seizures prevented Congress from authorizing "fishing expeditions" into a corporation's books and records in order to secure evidence of violations of the Act, without a prior charge or complaint of violation. Fourth, whether Congress, in spite of the apparently explicit language authorizing subpoenas, had actually intended to grant the administrator the authority to subpoena corporate records without first determining that the subpoenaed party was subject to the provisions of the Act. Fifth, whether a court can order enforcement of an administrative subpoena without determining that there is "probable cause" to believe that the subpoenaed party is subject to the provisions of the Act.

These five specific questions concerned three general issues: whether a determination that the Act was constitutional was a prerequisite to enforcement of the subpoenas; whether the Fourth Amendment limits or prohibits administrative subpoena of corporate records; and whether the Congress had the power and intended to grant the Administrator the authority to subpoena corporate records without first determining that there was "coverage," that is, that the subpoenaed party was, in fact, subject to the provisions of the Act.

The main portion of the Court's opinion deals with resolving the questions contained in the latter two general issues. Specifically, the Court held that despite some ambiguous language in the legislative history, the Fair Labor Standards Act clearly granted the Administrator the power to issue subpoenas to determine compliance with the Act and that the power to determine compliance necessarily included the power to determine, by subpoenaing information, the threshold question of whether a business was subject to the Act. *Oklahoma Press Publishing Co.*, supra at 66 S.Ct. 506 and note 47. Secondly, the Court held that the investigative subpoena authority which had been granted the Administrator did not contravene the prohibitions contained in the Fourth Amendment.

Neither of these holdings compel the conclusion that a subpoenaed party cannot challenge the constitutionality of an act or regulation with which compliance is to be determined.

In fact, the holding in *Oklahoma Press Publishing Co.* that "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command" [supra at 505] and that the Administrator "shall not act arbitrarily or in excess of his statutory authority" [supra at 509], is predicated on the Court's explicit conclusion and holding that the Act's regulation of the newspaper was not unconstitutional as a violation of the First Amendment. Rather than hold that Oklahoma Press Publishing Company's attack on the constitutionality of the Act was improper or premature, the Court explicitly ruled upon that issue prior to considering the other two general issues, holding that the Act was constitutional. Unless this portion of the Court's opinion is regarded as surplusage, it must be regarded as authority for the Petitioners' contention that when administrative subpoenas is-

sued solely to determine compliance with specified regulations are sought to be judicially enforced, it is an "appropriate defense" that these regulations are unconstitutional.

Nonetheless, lower courts have consistently refused to examine the merits of a constitutional challenge to the underlying statutes or regulations in a subpoena enforcement proceeding. The misreading by lower courts of *Oklahoma Press Publishing Co.*, is typified by the logic employed by the Temporary Emergency Court of Appeals in this case. After summarizing its view of this Court's holding in *Oklahoma Press Publishing Co.*, the Temporary Emergency Court of Appeals stated that:

> "[t]he Court, in language now regarded as establishing the legal standard to be applied in subpoena enforcement proceedings, held that '[i]t is enough that the investigation be for a lawfully authorized purpose within the power of Congress to command.' 327 U.S. at 209. In the instant case, the appellants [Empire] have admitted that they are subject to the FEA's Mandatory Petroleum Allocation and Price Regulations. (Brief at 3.) Accordingly, the subpoenas were issued for a lawful purpose and are entitled to enforcement." (A-9).

This logic, currently governing the decisions of the lower courts, means that so long as the subpoenaed party is or may be "covered" by the act or regulation sought to be enforced, and the subpoenas are otherwise proper, they will be enforced even if they are issued only to determine compliance with acts or regulations that are unconstitutional on their face, or even admitted by the agency to be unconstitutional and unenforceable.

Of course, the courts cannot assume that the rule-making power will be abused; however, where such abuse

is demonstrated, the judiciary is duty-bound to inquire into the underlying facts and deny any bureaucratic excess.

For years the lower courts have used *Oklahoma Press Publishing Co.* as their guide in enforcing administrative subpoenas. However, in the thirty years since that case was decided, the lower courts have distorted its teaching to prevent interposing the type of defense which the Petitioners herein assert.

The Courts below have ignored the merits of constitutional challenges and have said, in effect, that if administrative agencies have the subpoena power, all subpoenas issued thereunder must be enforced. On the belief that justice delayed is justice denied, the Petitioners submit that the enforcement proceeding is an appropriate stage in which to test the constitutionality of the regulations. The parties are before the court, the legal issues are squarely framed, and a decision in favor of the opponent of the regulations will obviate the need for the subpoenaed party to bear the onerous and costly burden of complying with subpoenas which later become a legal nullity. The Petitioners submit that if the FEA regulations herein are constitutional no adverse affect will result from a judicial examination of them in the instant proceeding.

The Petitioners present a substantial question of constitutional law which has wide application to proceedings involving federal agencies, persons regulated by those agencies and the federal judiciary. The importance of the question is whether the scope of judicial inquiry in administrative subpoena enforcement proceedings is perfunctory or substantial. All persons subject to administrative subpoenas need to know what constitutes an "appropriate defense" and this case squarely presents that issue.

2. This Court Should Decide Whether It Is Constitutional for the Executive to Transfer, Without Prior Legislative Authorization, All the Existing Functions of a Legislatively-Created Administrative Agency to an Executive Office When the Statutory Authority for the Administrative Agency Has Expired.

The FEA was created by Congress as an independent agency. 15 U.S.C. §762. The Administrator of the FEA was appointed by the President, by and with the advice and consent of the Senate. 15 U.S.C. §763(a); 104 Cong. Rec. S 10862 (daily ed. June 18, 1974). The above entitled action was commenced by an officer of the FEA. On July 30, 1976, the legislation which created and authorized the FEA to fulfill its designated functions expired. 15 U.S.C. §§761 et seq.

On July 30, 1976, the President issued Executive Order No. 11930 purporting to transfer all of the functions of the FEA, its Administrator, officers and agents, to the Federal Energy Office and its Administrator, officer and agents. Such a transfer presumably was intended to encompass the continued prosecution of the above-entitled action. Executive Order No. 11930, Section 9(a), 41 F.R. 32399. The Executive Order provided that the Administrator of the FEO is to be appointed by the President but not subject to Senate confirmation. Executive Order No. 11930, Section 1, 41 F.R. 32399.

In the courts below, the Petitioners contended that such a transfer of functions was invalid, unauthorized and unconstitutional, because in order for the President to transfer the functions of an independent agency created by statute, and powers of its Administrator, appointed by the President and confirmed by the Senate, to an entity within the Executive Office and its Administrator, appointed solely by the President, specific enabling legislation making a determination that pending judicial subpoena enforcement proceedings may be continued must exist. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 118, 67 S.Ct. 1129, 1133 (1947). There is no such enabling legislation within the FEAA which authorizes the President to effect such a transfer. 15 U.S.C. §§761 et seq.

The Petitioners based their contentions on the case of *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947), which presented the question whether a successor administrator appointed by Executive Order No. 9809, 11 Fed. Reg. 14281, had the authority to enforce administrative subpoenas issued by his predecessor who had been appointed by the President and confirmed by the Senate. The Executive Order also transferred the functions of an independent agency to an entity within the Executive Office. The Court through Justice Douglas stated that:

> "We need not decide whether under the . . . Act the President had authority to transfer functions of an officer who need be confirmed by the Senate to one appointed by the President without Senate confirmation. For §2 of that Act provides:
>
> > '(That) in carrying out the purposes of this title the President is authorized to utilize, . . ., agencies, . . ., offices, or officers now existing by law, to transfer any duties or powers from one existing department, . . . agency, office or officer to another, . . .'
>
> The authority to 'utilize . . . offices, or officers now existing by law' is sufficient to sustain the transfer of functions under the Executive Order. . ."

The transfer of function in *Fleming* was deemed proper because the President had complied with the specific enabling legislation authorizing a transfer from an Administrator confirmed by the Senate to an Administrator appointed by the President, but in this case there is no similar enabling legislation. 15 U.S.C. §§761 et seq.

The question left open in *Fleming*, whether the executive can transfer, without prior legislative authorization, the functions of an officer, appointed by the President with confirmation by the Senate, to one appointed by the President without Senate confirmation arises in this case because the prosecution of the agency's subpoena enforcement proceedings was continued by the President's appointed officer when the statutory authority for the administrative agency had expired and no prior legislative authorization existed for the transfer of the functions of the legislatively created agency to an executive office.

If the Executive may, without any prior legislative authorization, continue the existence and functions of a legislatively created administrative agency upon expiration of its authorizing legislation by merely "transferring" it into the Executive Office, then the recognized distinction between the legislative and executive functions as established in Articles I and II of the Constitution will have fallen victim to the usurpation and abuse of power by the Executive. The Petitioners submit that congressional authorization for such a transfer is mandatory. If the Executive can merely "transfer" the functions of expiring administrative agencies to the Executive Office without prior legislative authorization and approval, then the Executive has gone beyond the Constitutional limits placed upon the proper exercise of Executive power. Such actions by the Executive result in inroads being made upon

the doctrine of separation of powers as guaranteed by the Constitution and it is the duty of this Court to act as a safeguard against such actions. Otherwise, the Executive would have the power to continue in existence, within the Executive Office, expired agencies merely by executive decree.

To allow the Executive access to such power creates a situation wherein the Executive Branch will make inroads upon the traditional functions of the Legislative Branch, that of conceiving, structuring, and most importantly, regulating administrative agencies which are designed to serve the public good. Executive usurpation of this legislative function impairs the separation of powers which acts as the cornerstone of the democratic system, and has the potential to do irreparable harm to the public welfare. This Court must ascertain whether access to such power, a power which has the ultimate potential to do harm to the public welfare, should be allowed.

Additionally, it is desirable for the Court to occasionally delineate standards which clarify and solidify the distinction between the legislative and executive functions. A question of interpretation of the recognized distinction between the legislative and executive functions is presented here. The Petitioners assert that this case presents one of those occasions where this Court should speak to and clarify such a distinction.

These questions, having been left unanswered by this Court in the *Fleming* case and being important primary Constitutional questions, should be answered.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Opinion of the Temporary Emergency Court of Appeals.

Respectfully submitted,

SHERIDAN MORGAN
HARRY A. MORRIS
DONALD H. LOUDON
STEVEN G. EMERSON
MORRIS, LARSON, KING, STAMPER & BOLD
Suite 400, Two Crown Center
2420 Pershing Road
Kansas City, Missouri 64108
(816) 421-6767
Attorneys for Petitioners

Of Counsel:
GIBBS, ROPER, LOOTS & WILLIAMS
757 North Broadway
Milwaukee, Wisconsin 63202

CERTIFICATE OF SERVICE

I, Sheridan Morgan, a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to Rule 33.2(a) of the Rules of the Supreme Court of the United States I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on January 4, 1977, addressed to Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530 and upon Rex E. Lee, Assistant Attorney General, and Barrie L. Goldstein, Attorney, Department of Justice, Washington, D.C. 20530, counsel for Respondents.

SHERIDAN MORGAN

APPENDIX

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 8-3

UNITED STATES OF AMERICA, *et al.*,
Petitioners-Appellees,

v.

EMPIRE GAS CORPORATION, *et al.*,
Respondents-Appellants.

Appeal from the United States District Court
for the Western District of Missouri

(No. 76-CV-64-W-4)

(Argued November 11, 1976 Decided December 8, 1976)

Before CHRISTENSEN, INGRAHAM, and ESTES, *Judges*.

ESTES, Judge.

This is an appeal from an August 9, 1976 order of the District Court for the Western District of Missouri enforcing 61 subpoenas issued by the Federal Energy Administration (FEA) to a retail marketer of propane, Empire Gas Corporation (Empire), and 60 of its subsidiaries (appellants). Empire and its approximately 300 subsidiaries are subject to FEA's Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210, 211 and 212.

The FEA began an audit of appellants' books and records in October, 1974, to determine whether there was compliance with FEA's regulations during the period February through October, 1974. On or about January 15, 1975, the audit was suspended at the request of appellants. In order to obtain documents and information for completion of the pending audit, the FEA issued to Empire and its subsidiaries the 61 subpoenas, the enforcement of which is at issue here.

In the interim between the initial audit and the subsequent issuance of the present subpoenas, Empire submitted, on September 2, 1975, to the General Counsel of FEA a Request for Interpretation of 10 C.F.R. Part 212, Subpart F, regarding the meaning of the FEA pricing regulations affecting its sales [designated Record on Appeal (D.R.) at 232]. On May 28, 1976, the FEA issued an interpretation to Empire "which does not support Empire's position," and Empire appealed that interpretation (D.R. 241). On October 1, 1976, the appeal was denied.

In October, 1975, the FEA issued subpoenas directing the appellants to appear, testify, and produce various books, records, and documents relating to the prices charged by appellants. Pursuant to 10 C.F.R. § 205(h)(1), Empire filed with FEA a motion to quash or suspend the above-mentioned subpoenas, which motion was denied. Appellants continued to refuse to comply with the subpoenas.

On January 29, 1976, the United States of America brought this action on behalf of the FEA for enforcement of the subpoenas.

On August 9, 1976, the district court found that the subpoenas were enforceable; denied appellants' motion to certify constitutional issues to this court pursuant to § 211

(c) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (ESA), as incorporated by reference in § 5(a) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. 751, *et seq.* (EPAA); and ordered the appellants to appear and give testimony before the appellees. The court further ordered that the appellants "make available for inspection and copying at the headquarters of Empire Gas Corporation all documents, records, and materials required by the subpoenas." (D.R. at 263)

On August 13, 1976, the appellants filed motions, *inter alia*, requesting a stay of the district court order of August 9, 1976; and on September 1, 1976, appellants filed a Motion to Modify the Court's Order enforcing the administrative subpoenas. On September 3, 1976, the court denied appellants' August 13 motions and, without ruling on the Motion to Modify, ordered the appellants to comply with the subpoenas by September 18, 1976. This court granted the stay on September 22, 1976.

The appellants base their resistance to enforcement of the subpoenas on three contentions: (1) that the subpoenas were issued to determine compliance with FEA regulations, 10 C.F.R. Parts 210, 211 and 212, which regulations are arbitrary, vague, and unconstitutional; (2) that the district court erred in not modifying the scope of the subpoenas to preclude reexamination by the FEA of records previously made available to the FEA; and (3) that the transfer of functions from the FEA, its administrator, officers and agents, to the Federal Energy Office (FEO), its administrator, officers and agents, was invalid, unauthorized, and unconstitutional, resulting in the expiration of the authorization for the subpoenas and, hence, termination of this subpoena enforcement action.

Laws, Regulations and Rulings Involved

The pertinent provisions of the statutes and regulations and FEA rulings involved are summarized, as follows:

A. *Statutory Provisions Involved*

Two statutes, the EPAA and the Federal Energy Administration Act of 1974, 15 U.S.C. 762, *et seq.* (FEAA), authorize the FEA to obtain data and information from parties subject to regulations issued pursuant to their mandates.[1]

Sections 13(b) and (e) of the FEAA, 15 U.S.C. 772 (b) and (e), specifically authorize the Administrator of the FEA to collect information and to issue subpoenas to compel the appearance of witnesses or the production of documents and records:

> § 13(b), 15 U.S.C. 772(b)—All persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption *shall make available to the Administrator* such information and periodic reports, records, documents, and other data, relating to the purposes of this Act, including full identification of all data and projections as to source, time, and methodology of development, as the Administrator may prescribe by regulation or orders as necessary or appropriate for the proper exercise of functions under this Act.
>
> • • •
>
> § 13(e) (1), 15 U.S.C. 772(e)—The administrator, or any of his duly authorized agents, *shall have the power to require by subpoena the attendance and testimony*

1. The procedures for implementing FEA's statutory authority to collect data and information by subpoena are set forth in FEA's procedural regulations at 10 C.F.R. 205.8.

> *of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section.* [Emphasis added.]

Section 13(e) (2) of the FEAA, 15 U.S.C. 772(e) (2), also provides that the agency may seek judicial enforcement of its subpoenas in any appropriate United States district court:

> (2) Any appropriate United States district court may, in case of contumacy or refusal to obey a subpoena issued pursuant to this section, issue an order requiring the party to whom such subpoena is directed to appear before the Administration and to give testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of this court may be punished by such court as a contempt thereof.

Similarly, the EPAA provides authority to issue subpoenas and to obtain judicial enforcement thereof. Section 5(a)(1) of the EPAA incorporates by reference Section 206 of the ESA, 12 U.S.C. § 1904 note, which states:

> The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpoena served upon any person under the provisions of this section, the

head of the agency authorizing such subpoenas, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

B. *FEA Pricing Regulations*

The present petroleum pricing regulations of the FEA orginated from the mandatory petroleum pricing program of the Cost of Living Council (CLC) and were established during Phase IV of the Economic Stabilization Program. In January, 1974, the FEA, pursuant to Executive Order 11748, 38 F.R 33575 (December 6, 1973), adopted without substantial change the CLC's Phase IV price regulations respecting crude oil and petroleum products. 39 F.R. 1924, *et seq.* (January 15, 1974). Section 212.93 of the original FEA price regulations was derived from § 150.359 of the CLC regulations and sets forth the price rule governing sales of petroleum products, including propane, by resellers and retailers like Empire and its subsidiaries.

The original § 212.93 of the FEA's regulations required that the maximum lawful price for a covered product be determined by taking the weighted average price at which the seller firm lawfully priced the covered product in transactions with the *class of purchaser* involved on May 15, 1973, and adding an amount which reflected, on a dollar-for-dollar basis, any *increased product costs* which the firm had incurred since that date. 10 C.F.R. § 212.93 (a). These increased product costs were required to be spread equally across all of that product which the firm had in inventory and applied equally to all purchasers for the purpose of determining the seller's maximum lawful selling price. Increased product costs which a firm was unable to pass through to its customers in a given month

could be accumulated (or "banked") and passed through in future months. 10 C.F.R. § 212.93(e). Also, the selling price could be increased to reflect certain nonproduct cost increases of the seller. 10 C.F.R. § 212.93(b).

Since January 15, 1974, § 212.93 has been amended several times. For example, in April, 1974, FEA amended § 212.93(b) to permit retailers like Empire to increase the selling prices for propane in order to reflect certain nonproduct cost increases. 39 F.R. 12019 (April 2, 1974). Furthermore, in November, 1974, FEA established a 10 percent limit on the amount of "banked costs" which may be used for price increases in a single month. 39 F.R. 39259 (November 6, 1974). In addition, FEA implemented a change in December, 1974, in the pricing of propane by permitting unequal application among classes of purchasers of increased product costs.

C. *FEA Ruling*

On March 7, 1975, FEA issued Ruling 1975-2, 3 CCH *Energy Management* ¶ 16,042, entitled "application of the Term 'Class of Purchaser' under FEA Petroleum Price Regulations," 40 F.R. 10655. Ruling 1975-2 interprets the manner in which the class of purchaser doctrine, initially established by the CLC and carried forward by the FEA, is to be applied. Under this ruling, the doctrine applies to all sales of covered products by resellers, like Empire, whose price must be based on the prices they charged various classes of purchasers for a particular product on May 15, 1973.[2]

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2. "By way of explanation and numerous examples, FEA's Ruling 1975-2 provided extensive and necessary clarification of the application of the CLC/FEA class of purchaser doctrine to the myriad transactions which can arise in the sale of crude oil and petroleum products. Consequently, the guidance contained in Ruling 1975-2 is applicable to sales made by Empire under the CLC/FEA regulations and the information which the FEA needs to complete its audit of Empire is in large measure determined by that Ruling." Appellees' (Government's) Brief, pp. 6-7.

I. The District Court Properly Enforced the Subpoenas Issued to Determine Compliance with the FEA's Mandatory Allocation and Pricing Regulations.

A. The appellants' contention that the FEA pricing and allocation regulations contained in 10 C.F.R. Parts 210, 211, and 212 for the pricing and allocation of crude oil and refined petroleum products, including propane, are unconstitutional because they are arbitrary, vague and ambiguous does not constitute a valid defense in this subpoena enforcement proceeding. At page 15 of their brief, appellants state:

> The crux of Appellants' objections is simple: application of the substantive regulations contained in 10 C.F.R. Parts 210, 211 and 212 is left to the arbitrary power of the FEA because there is no objective way, given the illusory definitions of "firm", "supplier", "retailer", etc. contained therein, of applying the price and allocation rules to complex business entities such as Empire and its subsidiaries.

Appellees correctly respond that appellants cannot resist enforcement of the subpoenas solely on the ground of alleged unconstitutionality of regulations which the appellees can not determine were violated until they have examined the subpoenaed information.

As the cases discussed below illustrate, a court need not determine that the regulatory scheme is valid and constitutional prior to issuing an order enforcing an agency subpoena.

In *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 66 S.Ct. 494 (1945), the Supreme Court rejected the petitioners' argument that the Administrator of the Wage and Hour Division of the Department of Labor could not enforce a subpoena without a prior ad-

judication that the act in question covered the petitioners' activities. The acceptance of the petitioners' contention "would stop much if not all of investigation at the threshold of inquiry. . . ." 327 U.S. at 213. The Court, in language now regarded as establishing the legal standard to be applied in subpoena enforcement proceedings, held that "[i]t is enough that the investigation be for a lawfully authorized purpose within the power of Congress to command." 327 U.S. at 209. In the instant case, the appellants have admitted that they are subject to the FEA's Mandatory Petroleum Allocation and Price Regulations. (Brief at 3.) Accordingly, the subpoenas were issued for a lawful purpose and are entitled to enforcement.

The validity of a subpoena issued by the Secretary of Labor in administrative proceedings under the Walsh-Healey Public Contracts Act was disputed in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The corporation resisted enforcement of the subpoena based, *inter alia*, on the allegedly "arbitrary, artificial, unreasonable, discriminatory, and capricious" (317 U.S. at 507) nature of a ruling by Secretary Perkins that the Act applied to petitioner. The Court rejected the argument and held:

> Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or *irrelevant* to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do. . . . [317 U.S. at 509, emphasis added]

The Supreme Court dismissed petitioner's assertions relating to "the meaning of the contract and the Act as implemented by administrative rulings in existence at the time of the making and performance of the contract ..." (317 U.S. at 509 note 11), by stating:

> The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, *but they are not of a kind that can be accepted as a defense against the subpoena.* [Emphasis added; *id.*]

The similarity between the arguments appellants urge we accept and those rejected by the Supreme Court in *Endicott Johnson* is apparent. The district court correctly held that the "determination of the applicability or validity of agency regulations is not a condition precedent to enforcement of an agency subpoena. Indeed, to find otherwise would . . . permit regulated parties an end run attack upon regulation whenever they found themselves broken at the center." (D.R. 260-261)[3]

In *Myers v. Bethlehem Corporation*, 303 U.S. 41, 58 S.Ct. 459 (1938), petitioner sought to enjoin the National Labor Relations Board from holding a hearing for the alleged reason that the Board lacked jurisdiction over it. The petitioner argued that it should not be subjected to a futile, expensive, and vexing hearing. As the district court noted below, the Supreme Court held that the petitioner's contention of irreparable damage was

> at war with the long settled rule of judicial administration that no one is entitled to judicial relief for

3. This is only the commencement of administrative procedures which must be exhausted prior to agency determination of violations of the Mandatory Allocation and Price Regulations. *See City of New York v. New York Telephone Co.*, 468 F.2d 1401, 1402 (TECA 1972).

> a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . . Obviously, the rule . . . cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. [303 U.S. at 50.]

In fact, the only case cited by the appellants in which the subpoenas were held to be unenforceable was *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission*, 328 F.2d 285 (10 Cir. 1964). The unrebutted affidavits which the *Shasta* appellants submitted to the district court described systematic persecution and harassment by the S.E.C. *Shasta* held that it was an appropriate exercise of judicial review, since the agency admitted the truth of the affidavits for purposes of a motion for summary judgment, to determine whether the S.E.C. was acting arbitrarily or outside the scope of its authority. 328 F.2d at 288. No element of harassment is present in this case, so *Shasta* is clearly distinguishable.

Section 307 of *Davis on Administrative Law*, cited by appellants (Brief p. 6), deals with the privilege against self-incrimination in subpoena enforcement proceedings, and it does not support the contention that it is a prerequisite to enforceability of these subpoenas that the regulatory scheme with which the appellants must comply be determined valid. Rather, it is stated in Section 307 that "a corporation . . . enjoy[s] no privilege against self incrimination and that [its] representatives similarly enjoy no privilege against self incrimination with respect to the records of the organization . . .," supported by *Wilson*

v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911). Justification for this rule is stated in *United States v. White,* 322 U.S. 694, at 701, 64 S.Ct. 1248, at 1252:

> Basically, the production of the records of any organization, whether it be incorporated or not, arises out of the *inherent and necessary power of the federal and state governments to enforce their laws,* with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records. [Emphasis added]

The appellants contend that enforcement of the subpoenas prior to a judicial determination of the validity of the FEA's Mandatory Allocation and Pricing Regulations will deny them effective relief. The substance of this contention is at page 19 of the appellants' brief:

> [They] anticipate that the appellees will respond to the above arguments by claiming that the objections are premature because no Notice of Probable Violation or Remedial Order has as yet been issued. However, no effective relief can be granted against the burden of complying with unconstitutional FEA subpoenas unless the constitutional issues are decided prior to compliance. The issues are clearly framed, the Appellants face immediate hardship, and the resolution of these issues will have sufficient immediate impact to satisfy any ripeness test posed by the court. No relief from the burden of the subpoenas can be granted to the Appellants if, after producing all their records for audit, it is determined that the regulations are invalid. Conversely, if the regulations are valid, no harm will inure to the FEA by being required to wait somewhat longer for the records, given that the information on the records themselves will not change. To defer the resolution of these issues is to deny the Appellants effective relief. Moreover, the Appellants are obligated to raise their constitutional objections at the earliest available stage lest the objections be waived.

This argument must be rejected. If the FEA determines that the appellants have violated the Mandatory Allocation and Price Regulations after examination of the subpoenaed information, the appellants will have an opportunity first to challenge those regulations in the administrative forum and later to seek judicial review.

The district court correctly stated: "It is, of course, significant that the applicability of the regulations to respondents cannot be determined until the information sought by subpoena is made available to the FEA investigators." (D.R. at 258-259)

II. The District Court Properly Refused to Modify the Scope of the Subpoenas.

Appellants contend that the district court erred in not modifying the scope of the subpoenas to preclude reexamination of documents and records previously made available in connection with the FEA audit commenced October 29, 1974. Administrative subpoenas should be enforced if the information sought is relevant. *United States v. Morton Salt,* 338 U.S. 632, 641-643 (1949); *Endicott Johnson v. Perkins, supra,* at 509; 1 Davis, *Administrative Law Treatise,* § 306, pp. 188-189 (1958). The information sought relates to the appellants' prices, costs, sales, purchases and receipts and is unquestionably relevant. The district court properly concluded (D.R. p. 259) that

> respondents' [appellants'] assertion of the burden inherent in providing the subpoenaed documents and

the resulting interruption of Empire's business operations fails to demonstrate a deprivation of due process of law, particularly in view of petitioners' [appellees'] willingness to make inspection of the documents at Empire's headquarters and make copies of any materials necessary for completion of the audit. Thus, respondents have failed to raise a substantial constitutional issue sufficient to require certification to the Temporary Emergency Court of Appeals and this Court has jurisdiction to determine enforceability of the subpoenas. *See Delaware Valley Apartment House Owners Ass'n v. United States*, 350 F.Supp. 1144, 1149-50 (E.D.Pa. 1973), *aff'd* 482 F.2d 1400 (TECA 1973).

Although the retail price reports of all appellants were made available in the course of the October 29, 1974, audit, the FEA focused only on the December part of the audit containing daily log sheets of 32 Empire subsidiaries. (Stipulation filed May 17, 1976; D.R. 199). Appellants maintain that this duplication of production of documents imposes an unnecessary burden, but they admit in their brief at p. 25 that "no specific evidence is contained in the record as to the precise degree of overlap." Appellants have not shown that the information sought by the subpoenas is unnecessarily duplicative; and the contention that they should be modified is denied.

III. The Administrator of the FEA Had Authority for Issuance and Judicial Enforcement of the Subpoenas, Correctly Enforced by the District Court.

Appellants' assertion that the temporary expiration[4] of the FEAA on July 30, 1976, both rendered the subpoenas unauthorized and removed the authority of the FEA Administrator to continue the subpoena enforcement action must be denied for the reasons discussed below. First, the general saving statute, 1 U.S.C. 109,[5] is applicable

4. The FEAA, which provided for the existence of the FEA and its Administrator, expired on July 30, 1976. Due to the expiration, the President issued Executive Order No. 11930, 41

(Footnote continued on following page)

(Continued from previous page)

F.R. 32399 (August 3, 1976), on July 30, 1976, establishing a Federal Energy Office (FEO) within the Executive Office of the President. Pursuant to Section 6 of Executive Order 11930, the Administrator of the newly-created FEO was given all of the authority of the defunct Administrator of the FEA. That authority included the power vested in the President by the EPAA. *See*, Executive Order No. 11790, 31 F.R. 23185 (June 27, 1974). On August 14, 1976, the Energy Conservation and Production Act, P.L. 94-385, 2 CCH *Energy Management* ¶ 10,450, was signed as a law. Section 112(a) of the Energy Conservation and Production Act extends the FEAA through December 31, 1977, and Section 112(b) of the act provides that the extension should be effective as of July 30, 1976. As a result, the President terminated the FEO in Executive Order No. 11933, 41 F.R. 36641 (August 31, 1976).

5. This statute provides in pertinent part:

§ 109. *Repeal of statutes as affecting existing liabilities.*

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Energy Policy and Conservation Act (EPCA), P.L. 94-163, December 22, 1975, amends and extends the EPAA through September 30, 1981; therafter, the district courts and this court will have continuing jurisdiction over actions within the meaning of the general saving statute, 1 U.S.C. § 109, and the new saving statute, EPAA § 18, as amended by the EPCA. The amended saving statute, EPAA § 18, added by EPCA § 461, explicitly provides:

[s]uch expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date [September 30, 1981], nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

to the case *sub judice*. Interpreting *Allen v. Grand Central Aircraft Company*, 347 U.S. 535 (1953), this court, in *United States v. State of California*, 504 F.2d 750, 754 (TECA 1974), *cert. denied*, 421 U.S. 1015 (1975), stated:

> [T]he "precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures *to enforce* the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration." 347 U.S. at 554-555, 74 S.Ct. at 756 [emphasis added].

Thus, actions in the nature of pending enforcement proceedings survive the expiration of the ESA; and by the same reasoning, such actions survive the expiration of the FEAA. *Accord, Tasty Baking Company v. Cost of Living Council*, 529 F.2d 1005, 1009-11 (TECA 1975). Cf. *People of State of California, State Lands Com'n v. Simon*, 504 F.2d 530 (TECA 1974).

The instant subpoena enforcement action was instituted on January 20, 1976, a date when the FEAA was in effect; and it survives as a pending enforcement proceeding initiated prior to the expiration of the FEAA, which act survives any termination by virtue of the saving provision in ESA Section 218. *Tasty Baking Company v. Cost of Living Council*, 529 F.2d at 1010-11.

Second, the President has the power to "delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States . . . as he deems appropriate." EPAA § 5(b). That Presidential authority includes the subpoena enforcement power contained in Section 206 of the ESA. Thus, the congressional grant within the EPAA of power to delegate enabled the President to establish the FEO and

to grant its Administrator subpoena enforcement authority identical to that previously given the Administrator of the FEA by the provisions of FEAA Sections 13(e)(1) and 13(e)(2).

Third, the legislative history reflects that Congress intended for the FEA to continue its functions in an uninterrupted fashion. According to the conference committee on the Energy Conservation and Production Act:

> The conferees completed their work on this legislation on July 30, 1976. Because the conference report could not be filed and acted upon by both Houses and presented to the President before the expiration of the Agency, the conferees added language to the bill to make the extension retroactive. It is the intent of the conferees that this retroactive provision have the effect of permitting the organic Act to continue uninterrupted. *Further, it is the intent of the conferees that the Agency, its functions (including pending regulatory matters)*, appointments and other personnel matters, prior obligations and programs, *shall be deemed to have continued uninterrupted despite the brief period between July 30, 1976 and the effective date of this legislation.*
>
> The conferees are aware that, because of the necessity to continue existing energy programs, the President issued Executive Order No. 11930 on July 30th establishing a Federal Energy Office (FEO) in the Executive Office of the President. The conferees do not intend to suggest that action taken during the hiatus period by the FEO and consonant with the procedures required by the FEA Act would be invalidated by this Act. [Conf. Rep. No. 94-1119, 94th Cong., 2d Sess., p. 68 (1976); emphasis added; U.S.

Code Cong. & Ad. News Pamphlet No. 8, p. 3199 at 3216]

Appellants mistakenly rely upon *Fleming v. Mohawk Wrecking and Lumber Company*, 331 U.S. 111, 91 L.Ed. 1375 (1946). There the Supreme Court held that the President had authority to transfer subpoena enforcement power from the Federal Works Administrator, an officer appointed by the President and confirmed by the Senate, to the Temporary Controls Administrator, a juridical creation of the President. The Court recognized that it would be inconsistent to require "an officer, previously confirmed by the Senate" to be "once more confirmed in order to exercise the powers transferred to him by the President." 331 U.S. at 118. The Court considered congressional intent:

> Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809.... [331 U.S. at 118-119]

The situation in the case before this court is not unlike that in *Fleming*. The President was given specific authority to grant subpoena enforcement power to the Administrator of the FEO, an individual who was confirmed by the Senate, and the Congress ratified his action in enacting the Energy Conservation and Production Act, P.L. 94-385 (August 14, 1976), 2 CCH *Energy Management* ¶ 10,450.

Even if there were any validity to appellants' assertion that the FEA Administrator's authority to enforce the subpoenas did not continue, the appellants overlook the authorization of delegation of subpoena power granted

by ESA Section 206 as incorporated by EPAA Section 5(a)(1), which provides in pertinent part:

> § 206. Subpoena power.
>
> The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purposes related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents. . . . In case of refusal to obey a subpoena served upon any person under the provisions of this section, the head of the agency authorizing such subpoena, or his delegatee, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

Clearly, appellees relied upon this section of the statute in their Petition for Enforcement (D.R. at 1), and plainly this is an independent basis for the Administrator's continued exercise of subpoena enforcement authority.

The order of the district court appealed from is AFFIRMED.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES of America et al., Petitioners,

v.

EMPIRE GAS CORPORATION et al., Respondents.

No. 76 CV-64-W-4

United States District Court, W. D. Missouri, W. D.

Filed: Aug. 9, 1976.

ORDER

ELMO B. HUNTER, District Judge.

This is an action to enforce sixty-one subpoenas issued by the Federal Energy Administration (FEA) to Empire Gas Corporation (Empire) and sixty of its subsidiaries in order to complete an audit pursuant to FEA's regulatory scheme. Empire, a retail marketer of propane operating approximately 300 subsidiaries located in several states, is subject to FEA's Mandatory Petroleum Allocation and Price Regulations (10 C.F.R. §§ 210, 211 and 212).

Jurisdiction is alleged under Sections 206 and 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§ 751 et seq. (1973), and upon Section 13(e)(2) of the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761 et seq., and regulations promulgated thereunder.

The subpoenas here in issue, served in October 1975, direct respondents to appear, testify, and produce various documents and records. Empire's subsequent motion to quash or suspend service of the subpoenas, filed with FEA's regional office, was denied. Empire continued to refuse compliance with the subpoenas and, on January 20, 1976, FEA brought this action for enforcement.

On April 29, 1976, the parties entered into a stipulation whereby counsel for Empire accepted service of the subpoena issued to Empire's parent corporation, as well as the subpoenas directed to sixty subsidiaries. On May 3, 1976, this Court ordered respondents to show cause why FEA's subpoenas should not be enforced, and return to that Order was filed May 12, 1976. At the hearing conducted on May 14, 1976, both parties presented evidence and respondents submitted a trial brief. Following petitioner's brief responding to respondents' contentions, filed on July 26, 1976, respondents filed a Motion to Certify Constitutional Issues to the Temporary Emergency Court of Appeals pursuant to § 211(c) of the Economic Stabilization Act of 1970, as incorporated by reference in § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973.

Jurisdiction

The first issue to be determined herein is the jurisdiction of this Court to entertain the claims raised by the parties. Section 13(b) and (e) of the Federal Energy Administration Act, 15 U.S.C. § 772(b), (e), clearly authorize the Administrator of FEA or authorized agents to collect information and issue subpoenas, and Section 13(e)(2) of the Act, 15 U.S.C. § 772(e)(2) further provides:

> Any appropriate United States district court may, in case of contumacy or refusal to obey a subpoena issued pursuant to this section, issue an order requiring the party to whom such subpoena is directed to appear before the Administration and to give testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

A further provision for judicial review, however, complicates the jurisdictional issue. Section 5(a)(1) of the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 754(a)(1) (1973), incorporates by reference and applies to FEA's actions the judicial review provisions of Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. Section 211 creates a Temporary Emergency Court of Appeals with powers and jurisdiction of a Circuit Court of Appeals for the purposes of litigation brought under the Emergency Petroleum Allocation Act. Further, Section 211(c) limits the jurisdiction of United States District Courts as follows:

> In any action commenced under this title in any district court of the United States in which the court determines that *a substantial constitutional issue* exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition. (emphasis supplied)

Thus, if respondents have raised a substantial constitutional issue in their opposition to the enforcement of FEA's

subpoenas, this Court must certify such issue to the Temporary Emergency Court of Appeals.

Upon careful review of the record and evidence presented in this case, however, this Court has determined that no substantial constitutional issue exists. Respondents have challenged enforcement of the subpoenas on the ground that the regulations on which they are based are ambiguous and arbitrary as applied, and that compliance with the subpoenas would be unduly burdensome, thus depriving respondents of due process of law. These constitutional arguments are without merit for the following reasons. First, this Court finds no ambiguity in the terms "firm," "seller," "reseller," and "retailer" as employed in the regulations, and further finds that FEA's Interpretation of May 28, 1976, removes any doubt which Empire may have entertained concerning the application of the regulations to its business operations.[1]

Moreover, the facts fail to support respondents' allegation of arbitrary or inconsistent application of FEA regulations to Empire and its subsidiaries; rather, the Court finds that although the investigation by FEA into possible price violations by Empire and its 300 subsidiaries has been interrupted and delayed over the course of two years, the evidence reveals neither arbitrary nor inconsistent application of the regulations. As for respondents' assertion that the regulations permit arbitrary application by FEA, it is of course significant that the applicability of the regulations to respondents cannot be determined until the information sought by subpoena is made available to the FEA investigators. In other words, the application of the

1. In addition, the Court notes that although Empire has appealed through agency procedures certain of the issues dealt with in the FEA Interpretation, the appeal contains no claim of ambiguity in the regulations or inability to ascertain how the terminology of the regulations should be applied.

definition of a "firm" to Empire—the basis of respondents' constitutional attack on the regulations—can be determined only on the basis of information which at all times has been available to Empire and its subsidiaries and access to which respondents attempt to deny petitioners.

Finally, respondents' assertion of the burden inherent in providing the subpoenaed documents and the resulting interruption in Empire's business operations fails to demonstrate a deprivation of due process of law, particularly in view of petitioners' willingness to make inspection of the documents at Empire's headquarters and make copies of any materials necessary for completion of the audit. Thus, respondents have failed to raise a substantial constitutional issue sufficient to require certification to the Temporary Emergency Court of Appeals and this Court has jurisdiction to determine enforceability of the subpoenas. See *Delaware Valley Apartment House Owners Ass'n v. United States*, 350 F.Supp. 1144, 1149-50 (E.D.Pa.1973), aff'd 482 F.2d 1400 (Em.App.1973).

Enforceability of Subpoenas

The power of the FEA to subpoena documents in the course of its investigations is a broad one, and it is sufficient for enforceability of its subpoenas that the inquiry is within the agency's authority, the demand is not too indefinite, and the information sought is reasonably relevant to a proper subject of inquiry. *United States v. Morton Salt Co.*, 358 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *Civil Aeronautics Board v. Hermann*, 353 U.S. 322, 77 S.Ct. 804, 1 L.Ed.2d 852 (1957); *Adams v. Federal Trade Commission*, 296 F.2d 861 (8th Cir. 1961), cert. denied 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83. These requirements clearly

were met by the subpoenas sought to be enforced in this action.

Nevertheless, respondents have attempted to assert the alleged arbitrariness in the FEA regulatory scheme as a defense to enforceability of the subpoenas. The futility of this argument, however, is illustrated by the United States Supreme Court's holding in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 214, 66 S.Ct. at 508, where subpoenas of the Federal Trade Commission were enforced despite a challenge on the ground that petitioner was not covered by the Fair Labor Standards Act. The Court stated:

> We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it. No constitutional provision forbids Congress to do this.

Thus, determination of the applicability or validity of agency regulations is not a condition precedent to enforcement of an agency subpoena. Indeed, to find otherwise would disable the agency from rendering a complete decision on an alleged violation as Congress has directed, and would permit regulated parties an end run attack upon regulation whenever they found themselves blocked at the center. Such interference by the courts in every

instance with agency proceedings is neither advisable nor permissible.[2]

It is further important to note at this point that this action arises after a delay of approximately one year in the audit necessary for FEA to initiate the compliance process. There has, as yet, been no determination of pricing violations by Empire or its subsidiaries, no remedial order issued by FEA, nor any administrative appeal by Empire challenging the validity of the remedial order. Only by compliance with the subpoenas may Empire's status be determined, and only after exhaustion of available administrative remedies in the event of a violation will Empire's compliance with the FEA regulations be an appropriate subject for judicial review. See *Adams*

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2. The enforceability of the subpoenas despite challenge to the regulations is further indicated by specific statutory provision. The judicial review section of the Economic Stabilization Act of 1970, incorporated by reference and made applicable to the Emergency Petroleum Price Allocation Act, provides:

> The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

Therefore, respondents' claim that FEA's subpoenas are unenforceable due to constitutional infirmities in the price regulations does not require that this Court refuse enforcement of the subpoenas on constitutional grounds. See *Refiners Ass'n v. Dunlop*, 486 F.2d 1388 (Em.App.1973); *United States v. Ohio*, 487 F.2d 936 (Em.App.1973); see also *Delaware Valley Apartment House Owners Ass'n v. United States*, 350 F.Supp. 1144, 1149-50 (E.D. Pa.1973), aff'd 482 F.2d 1400 (Em.App.1973). Nothing in the statute indicates an intention to deprive the District Courts of their power to enforce agency subpoenas, and such an intention will not be inferred.

v. Federal Trade Commission, 296 F.2d 861, 864 (8th Cir. 1961), cert. denied 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (1962); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1937).

Thus, the only remaining determination for this Court is whether the agency abused its discretion in issuing the subpoenas to Empire and its subsidiaries. No abuse of discretion is revealed by the evidence in this case. Rather, the information sought by subpoena is necessary to completion of the audit pursuant to the regulatory scheme, and the issuance of the subpoenas, under the circumstances, was neither premature nor unreasonable. Neither is this a case where sensitive constitutional rights are implicated upon compliance with the subpoena, nor is there any element of harassment where, as here, the subpoena was issued and enforced according to law. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 217, 66 S.Ct. 494. Finding no abuse of discretion in the issuance of the subpoenas, this Court has determined that the subpoenas are enforceable.

For all the foregoing reasons, therefore, it is

ORDERED that respondents' Motion to Certify Constitutional Issues to the Temporary Emergency Court of Appeals is denied. It is further

ORDERED that respondents appear before petitioners and give testimony as required by the subpoenas, and that respondents make available for inspection and copying at the headquarters of Empire Gas Company all documents, records, and materials required by the subpoenas.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 76 CV-64-W-4

UNITED STATES OF AMERICA, et al.,
Petitioners,

vs.

EMPIRE GAS CORPORATION, et al.,
Respondents.

ORDER

(Filed: September 3, 1976)

On August 13, 1976, respondents filed their Motion to Vacate Order and Dismiss, or in the Alternative to Substitute Parties and their Motion for Stay of this Court's Order Requiring Respondents to Give Testimony and Produce Documents Required by Subpoenas. In order to afford the parties the full opportunity to brief the issues raised in those motions, the Court *sua sponte* entered an Order on August 16, 1976, staying the Court's Order and Judgment of August 9, 1976, pending disposition of those motions. As the parties have fully submitted their suggestions and briefs in support of their respective positions with regard to respondent's pending motions, those motions are now properly before the Court for its determination.

In their Motion to Vacate or to Substitute Parties, filed August 13, 1976, respondents argue that as the Federal Energy Administration Act expired July 30, 1976,

the Federal Energy Administration was no longer in existence and thus without authority to enforce the subpoenas which have been in question in these proceedings. Further, respondents urge that Executive Order No. 11930, issued by the President on July 30, 1976, was ineffective to transfer the functions of the FEA to the FEO and its Administrator.

Subsequent to the filing of respondents' motion, the President signed into law the Energy Conservation and Production Act. That Act, signed on August 14, 1976, provides in §112 for the extension of the Federal Energy Administration Act of 1974 to December 31, 1977. Section 112 provides:

> (a) The second sentence of section 30 of the Federal Energy Administration Act of 1974 is amended to read as follows: "This Act shall terminate December 31, 1977.
>
> (b) The amendment made by subsection (a) to section 30 of the Federal Energy Administration Act of 1974 shall take effect on July 30, 1976.

On August 27, 1976, respondents filed additional suggestions in support of their motion to vacate the Court's Order and Judgment of August 9, 1976. Therein they contend that despite the language of §112(b), the FEA lost authority to continue enforcement of the subpoenas at issue in this cause and that the FEA must now seek to issue new subpoenas, which the Court assumes respondents would in due course oppose and contest.

After careful consideration of the respondents' arguments in support of their Motion to Vacate, the Court finds that motion to be without merit. The Court is persuaded that Congress had the authority to and intended to continue the powers and functions of the FEA uninterrupted from

July 30, 1976, until the termination date of the Act as set forth in §112(a) of the Energy Conservation and Production Act. The Conference Report on that Act states in pertinent part:

> It is the intent of the conferees that this retroactive provision [§112(b)] have the effect of permitting the organic Act to continue uninterrupted. Further, it is the intent of the conferees that the Agency [FEA], *its functions* (*including pending regulatory matters*), appointments and other personnel matters, prior obligations and programs, shall be deemed to have continued uninterrupted despite the brief period between July 30th, 1976, and the effective date of this legislation. (Emphasis added).

As the Court remains unpersuaded by the matters raised in respondents' Motion to Vacate and Substitute and their suggestions in support thereof, that Motion will be denied. The Court's Order and Judgment of August 9, 1976, will not be vacated and respondents will be ordered to comply with that Judgment within fifteen (15) days of this date.

Remaining for the Court's consideration and disposition is respondents' Motion for Stay of this Court's Order Requiring Respondents to Give Testimony and Produce Documents Required by Subpoenas filed August 13, 1976. Upon consideration of the respondents' arguments made in support of their application for a stay pending appeal, this Court, in the exercise of its discretion, has determined that the motion for stay should be denied. First, the Court is not convinced that respondents will suffer irreparable injury should they be required to comply with the Court's Order and Judgment and the subpoenas pending appeal. Second, the Court is of the view that respondents are not likely to prevail upon appeal. In that respect,

the Court has reconsidered the matters and issues raised in this proceeding and remains convinced that its findings and ruling expressed in the Court's Order and Judgment of August 9, 1976, are correct. Further, the Court is unpersuaded that a granting of a stay would be in the public interest. Accordingly, the respondents' Motion for Stay Pending Appeal will be denied.

For the foregoing reasons, it is therefore

ORDERED that respondents' Motion to Vacate Order and Dismiss, or in the Alternative to Substitute Parties be, and the same is hereby denied, and it is further

ORDERED that respondents' Motion for Stay of this Court's Order Requiring Respondents to Give Testimony and Produce Documents Required by Subpoenas be, and the same is hereby, denied, and it is further

ORDERED that respondents comply with the Court's Order and Judgment of August 9, 1976, within fifteen (15) days of the date of this Order.

/s/ Elmo B. Hunter
United States District Judge

APPENDIX D

EXECUTIVE ORDER NO. 11930

Performance by the Federal Energy Office of Energy Functions of the Federal Energy Administration

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Energy Policy and Conservation Act (89 Stat. 871, 42 U. S. C. 6201 *et seq.*), the Emergency Petroleum Allocation Act of 1973, as amended (15 U. S. C. 751 *et seq.*), the Energy Supply and Environmental Coordination Act of 1974 (88 Stat. 246, 15 U. S. C. 791 *et seq.*), the Defense Production Act of 1950, as amended (50 U. S. C. App. 2061 *et seq.*), the Energy Reorganization Act of 1974 (88 Stat. 1233, 42 U. S. C. 5801 *et seq.*), Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U. S. C. 581c), Section 232 of the Trade Expansion Act of 1962, as amended (19 U. S. C. 1862), Section 301 of Title 5 of the United States Code, and Section 3301 of Title 5 of the United States Code, and consistent with the provisions of 5 CFR 351.301, and as President of the United States of America, it is hereby ordered as follows:

SEC. 1. There is hereby established in the Executive Office of the President a Federal Energy Office, which shall be under the immediate supervision and direction of an Administrator of the Federal Energy Office, hereinafter referred to as the Administrator, who shall be appointed by the President. The Administrator shall be compensated at the rate now or hereafter prescribed by law for level II of the Executive Schedule.

SEC. 2. Within the framework of the Energy Resources Council, the Administrator shall advise the President with respect to the establishment and integration of domestic and foreign policies relating to the production, conservation, use, control, distribution, and allocation of energy and, with respect to all other energy matters, and shall perform such other functions as may be delegated to him pursuant to law.

SEC. 3. There shall be in the Federal Energy Office the following officers each of whom shall be appointed by the President and each of whom shall receive compensation at the rate now or hereafter prescribed by law for that level of the Executive Schedule indicated: Two deputy administrators (level III); six assistant administrators (level IV); a general counsel (level IV); and a director of intergovernmental, regional and special relations (level V).

SEC. 4. The Administrator is hereby designated, pursuant to section 14 of the Energy Supply and Environmental Coordination Act of 1974, as the Federal Energy Administrator for purposes of the Energy Supply and Environmental Coordination Act of 1974, and section 119 of the Clean Air Act, as amended (42 U. S. C. 1857).

SEC. 5. The Federal Energy Office established by this order is designated the agency to carry out all functions vested in the Administrator of the Federal Energy Administration under the Energy Policy and Conservation Act.

SEC. 6. There is hereby delegated to the Administrator all the authority that was delegated to the Administrator of the Federal Energy Administration pursuant to Executive Order No. 11790 of June 25, 1974 and Executive Order No. 11912 of April 13, 1976.

SEC. 7. The Administrator is designated a member of the Energy Resources Council established by the Energy Reorganization Act of 1974 and Executive Order No. 11814 of October 11, 1974, as amended, and shall perform the functions assigned by the President and by the Chairman of the Council, who is the Secretary of Commerce, to the Administrator of the Federal Energy Administration.

SEC. 8. The Administrator shall exercise the functions of the Administrator of the Federal Energy Administration under Proclamation No. 3279, as amended.

SEC. 9. (a) All orders, rules, regulations, rulings, interpretations, or other directives issued or pending, all rule making, judicial or administrative proceedings commenced or pending, all voluntary agreements, plans of action, and all other actions commenced or taken by, under the authority of or ratified by the Administrator of the Federal Energy Administration prior to the effective date of this order that would be valid under the authority delegated or transferred by this order, are hereby continued, confirmed, ratified and made effective under this order and shall remain in full force and effect, unless or until altered, amended, or revoked by the Administrator or by such competent authority as he may specify.

(b) All personnel, property, records, contracts, obligations, cooperative agreements, rights, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available, in connection with functions of the Administrator of the Federal Energy Administration are hereby transferred to the Federal Energy Office.

(c) The Administrator is authorized to exercise the authority of the President under the Defense Production Act of 1950, as amended, to establish not more than eight

positions and to appoint individuals to such positions compensated at the rate now or hereafter prescribed by law for level V of the Executive Schedule.

(d) All individuals who, immediately prior to the effective date of this order, are serving in or have been nominated to positions under the Federal Energy Administration Act of 1974, which correspond to the positions established in the Federal Energy Office by sections 1 and 3 of this order are, on the effective date of this order, appointed to the positions established in the Federal Energy Office by sections 1 and 3 of this order.

(e) All individuals appointed to and serving in positions in grades GS-16, 17 and 18 pursuant to the Federal Energy Administration Act of 1974, which appointments have been approved as to classification and qualifications by the Civil Service Commission, shall be continued in such grade unless any such position is determined by the Civil Service Commission to involve responsibilities substantially less than those responsibilities involved when originally established pursuant to the Federal Energy Administration Act of 1974. Continuation in such grades shall also be subject to allotment by the Civil Service Commission of available positions in grades GS-16, 17 and 18. The Civil Service Commission shall discharge its responsibilities with respect to the allotment of positions in grades GS-16, 17 and 18 by providing, consistent with law, the efficiency of the Civil Service, and the provisions of this order, for the allotment of sufficient positions in grades GS-16, 17 and 18 to carry out the first sentence of this subsection (e) and to provide for such additional positions as the Administrator and the Civil Service Commission deem necessary.

(f) Nothing in the order shall affect rights to reemployment under the provisions of section 5(a)(1)(B) of

the Emergency Petroleum Allocation Act of 1973, as amended, or section 212(g) of the Economic Stabilization Act of 1970, as amended. Any employee transferred pursuant to subsection (b) of this section having a right to reemployment under the provisions of section 28 of the Federal Energy Administration Act of 1974 shall retain that right during the period of his employment with the Federal Energy Office established by this order. Any employee of the Federal government appointed, without a break in service of one or more work days, to any position in the Federal Energy Office established by this order shall have the rights of reemployment provided by subpart B of Part 352 of title 5 of the Code of Federal Regulations.

SEC. 10. The Administrator shall, before promulgating proposed rules, regulations, or policies affecting the quality of the environment, provide a period of not less than five working days from receipt of notice of the proposed action during which the Administrator of the Environmental Protection Agency may provide written comments concerning the impact of such rules, regulations, or policies on the quality of the environment. Such comments shall be published along with public notice of the proposed action. The review required by this section may be waived for a period of 14 days if there is an emergency situation which, in the judgment of the Administrator, requires immediate action.

SEC. 11. The Administrator of General Services shall provide, on a reimbursable basis, such administrative support as may be needed by the Federal Energy Office. All departments and agencies of the Executive branch shall, to the extent permitted by law, provide assistance and information to the Administrator of the Federal Energy Office.

SEC. 12. This order shall become effective on July 31, 1976.

Gerald R. Ford

July 30, 1976.

No. 76-936

In the Supreme Court of the United States

OCTOBER TERM, 1976

EMPIRE GAS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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EMPIRE GAS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In October 1975, the Federal Energy Administration (FEA) issued subpoenas to petitioners for the purpose of determining their compliance with certain of FEA's regulations (10 C.F.R. Parts 210, 211, and 212). Petitioners have not complied with these subpoenas. On January 29, 1976, the United States instituted this suit in the United States District Court for the Western District of Missouri to obtain the enforcement of the subpoenas. The district court ordered that the subpoenas be enforced (Pet. Apps. B, pp. B-1 to B-8, and C, pp. C-1 to C-4). The Temporary Emergency Court of Appeals affirmed (Pet. App. A, pp. A-1 to A-19).

1. Petitioners concede that they are subject to regulation under 10 C.F.R. Parts 210, 211, and 212 (Pet. 9), and that the FEA has authority to issue subpoenas (Pet. 6-8, 14). Petitioners also do not challenge any attribute of the

subpoenas themselves (Pet. 14). Their principal defense to the enforcement of the subpoenas instead is that the regulations (10 C.F.R. Parts 210, 211, and 212) are unconstitutionally vague and arbitrary. But the court of appeals, relying on an unbroken line of authority, correctly held that petitioner's claim did not constitute a valid defense in a subpoena enforcement proceeding (Pet. App. A, p. A-8).

Petitioners acknowledge (Pet. 18) that the lower courts consistently have refused to examine the merits of a constitutional challenge to underlying statutes or regulations in a subpoena enforcement proceeding. See, *e.g., Securities and Exchange Commission* v. *Brigadoon Scotch Dist. Co.*, 480 F. 2d 1047, 1052 (C.A. 2), certiorari denied, 415 U.S. 915; *Securities and Exchange Commission* v. *Savage*, 513 F. 2d 188, 189 (C.A. 7); *Adams* v. *Federal Trade Commission*, 296 F. 2d 861, 864 (C.A. 8), certiorari denied, 369 U.S. 864; *Federal Maritime Commission* v. *Port of Seattle*, 521 F. 2d 431, 434 (C.A. 9); *United States* v. *Feaster*, 376 F. 2d 147, 149-150 (C.A. 5), certiorari denied, 389 U.S. 920; *American International Trading Co.* v. *Bagley*, 536 F. 2d 1196, 1198 (C.A. 7). Petitioners contend (Pet. 18), however, that all of these courts, like the courts below in this case, have misconstrued this Court's opinion in *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (see also *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501), and that review is necessary to correct this widespread misunderstanding.

But the unanimous view of the lower courts is in full accord with the opinions of this Court. In *Oklahoma Press Publishing Company*, the Secretary of Labor had issued subpoenas to investigate whether the activities of certain employers were covered by the Fair Labor Standards Act. The employers resisted enforcement of the subpoenas on the ground that the Fair Labor Standards Act, enacted pursuant to the Commerce Clause, could not constitutionally cover their activities. This Court held that

the subpoenas should be enforced without a prior determination of whether the Act covered or could cover the employers' activities. The Court pointed out that the acceptance of the petitioners' contention "would stop much if not all of investigation * * * at the threshold of inquiry * * *" (327 U.S. at 213). "It is enough," the Court said, "that the investigation be for a lawfully authorized purpose, within the power of Congress to command" (*id.* at 209).

Similarly, in *Endicott Johnson Corp.* a contractor had refused to comply with an administrative subpoena issued to determine compliance with the Walsh-Healey Public Contracts Act, on the ground that the business transactions sought to be investigated were not covered by the Act. This Court rejected that contention, stating (317 U.S. at 509; emphasis added; footnote omitted):

> [P]etitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, *but they are not of a kind that can be accepted as a defense against the subpoena.*

These principles apply with equal force here. The subpoenas are themselves valid and are a part of an investigation undertaken for a lawfully authorized purpose (Pet. App. A, p. A-9). The court below thus properly ordered that the subpoenas be enforced so that the investigation could proceed. The alleged constitutional infirmity of the underlying regulations is more appropriately raised as a defense to a determination by FEA, if any such determination is made, that a violation of the regulations has occurred. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

2. Petitioners also contend (Pet. 20-23) that the authority to continue the subpoena enforcement proceedings lapsed when the Federal Energy Administration Act of 1974 (FEAA), 88 Stat. 96, 15 U.S.C. (Supp. V) 761 *et seq.*,

expired on July 30, 1976.[1] This contention was properly rejected by the court of appeals in an opinion on which we rely (Pet. App. A, pp. A-14 to A-19).

As the court of appeals explained (Pet. App. A, pp. A-14 to A-16), the general savings statute, 1 U.S.C. 109, consistently has been construed to provide that pending enforcement proceedings, like the one here, survive the expiration of a temporary enactment. See, *e.g., United States* v. *California*, 504 F. 2d 750, 754 (T.E.C.A.), certiorari denied, 421 U.S. 1015; *Carpenters 46 County Conference Board* v. *Construction Industry Stabilization Committee*, 522 F. 2d 637 (T.E.C.A.); *State Trial Attorneys Association* v. *Flournoy*, 522 F. 2d 1406 (T.E.C.A.). That statute applies here to permit the investigation to proceed despite the expiration of the FEAA.

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[1]The United States instituted this suit on January 29, 1976, on behalf of the Administrator of the FEA, Frank G. Zarb, who had authority to issue subpoenas under both Section 13(e)(1) of FEAA, 15 U.S.C. (Supp. V) 772(e)(1), and Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 87 Stat. 633, as amended, 15 U.S.C. (Supp. V) 754(a)(1), which incorporates Section 206 of the Economic Stabilization Act of 1970 (ESA), 84 Stat. 800, as amended, 12 U.S.C. (Supp. V) 1904 note. On July 30, 1976, the FEAA expired (Pub. L. 94-332, 90 Stat. 784). The President thereafter established a Federal Energy Office (FEO) within the Executive Office and named Mr. Zarb as its Administrator. Executive Order 11930, 41 Fed. Reg. 32399. Mr. Zarb was given all the authority he previously had as Administrator of the FEA. *Ibid.* That authority included the subpoena enforcement power vested in the President by the EPAA and previously delegated to the FEA Administrator. See Executive Order 11790, 39 Fed. Reg. 23185. The United States, on behalf of Mr. Zarb as the Administrator of FEO, continued to maintain its suit against petitioners.

On August 14, 1976, the Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125, was signed into law; it extended the FEAA through December 31, 1977, and provided that this extension should be effective as of July 30, 1976. Section 112 of the Act, 90 Stat. 1132. The FEO thereafter was terminated by the President. Executive Order 11933, 41 Fed. Reg. 36641.

Aside from that, however, on August 14, 1976, the FEAA was extended through December 31, 1977 (see note 1, *supra*) and it is plain that in extending the Act Congress intended that the Federal Energy Administration would continue its functions in an uninterrupted fashion. The Conference Committee report on the extension of the Act explains (S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess. 68 (1976); emphasis added):

> The conferees completed their work on this legislation [the Energy Conservation and Production Act] on July 30, 1976. Because the conference report could not be filed and acted upon by both Houses and presented to the President before the expiration of the Agency, the conferees added language to the bill to make the extension retroactive. It is the intent of the conferees that this retroactive provision have the effect of permitting the organic Act to continue uninterrupted. *Further, it is the intent of the conferees that the Agency, its functions (including pending regulatory matters),* appointments and other personnel matters, prior obligations and programs, *shall be deemed to have continued uninterrupted despite the brief period between July 30th, 1976 and the effective date of this legislation.*[2]

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[2]At the same page of its report, the Conference Committee indicated that Congress approved and ratified the President's temporary transfer of the FEA's authority to the FEO Administrator (see note 1, *supra*):

> The conferees are aware that, because of the necessity to continue existing energy programs, the President issued Executive Order No. 11930 on July 30th establishing a Federal Energy Office (FEO) in the Executive Office of the President. The conferees do not intend to suggest that actions taken during the hiatus period by the FEO and consonant with the procedures required by the FEA Act would be invalid by this Act.

Thus, petitioners' reliance upon *Fleming* v. *Mohawk Wrecking & Lumber Company*, 331 U.S. 111, is misplaced. In *Fleming*, this Court upheld the President's transfer of subpoena enforcement

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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authority from the Federal Works Administrator, an officer appointed by the President and confirmed by the Senate, to the Temporary Controls Administrator, a juridical creation of the President. In language that is fully applicable to the situation here, the Court stressed that Congress subsequently had approved and ratified this transfer (331 U.S. at 118-119; footnote omitted):

> Any doubts * * * [about the validity of the transfer are] removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action * * *.

Moreover, the subpoena enforcement proceeding here was instituted under EPAA as well as the FEAA (see note 1, *supra*), and the FEO Administrator had authority under the former statute, notwithstanding the expiration of the latter, to continue that proceeding (Pet. App. A, pp. A-16 to A-17, A-18 to A-19; see *id.* at A-4 to A-5).